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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

THOMAS F. LUKEN
1290 E. Oakland Park Blvd.
Ft. Lauderdale, FL 33334
(305)561-9500

Counsel for Appellants

December 10, 1984

QUESTIONS PRESENTED

1. May a State taxing Statute impose an unequal tax burden on airlines as opposed to other common carriers without violating the equal protection provisions of the United States Constitution?

2. May a State taxing Statute impose a burden on interstate commerce if that burden is not "properly apportioned" to instate activities and if that burden is not "fairly related" to the taxed activity?

PARTIES TO THE PROCEEDING

Northeastern International Airways, Inc., a Pennsylvania corporation, has no affiliates or partially owned subsidiaries.

Arrow Air, Inc., a Delaware corporation, is affiliated with International Air Leases, Inc., Bach-Air, Inc., Del-Air, Inc., and Aircraft Leasing Inc.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....1

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....5

INSIDE CAPTION.....8

OPINIONS BELOW.....9

JURISDICTION.....10

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....12

STATEMENT OF CASE.....16

REASONS SUPPORTING PLENARY CONSIDERATION.....26

I. Senate Bill 8A Establishes an Unconstitutional Classification Between Airlines and Other Common Carriers Both in the Imposition of the Tax and in its Method of Computation.....29

II. Senate Bill 8A Imposes an Unconstitutional Burden Upon Interstate Commerce in that the Tax Involved is not "Properly Apportioned" to Instate Activities and is not "Fairly Related" to the Taxed Activity.....34

CONCLUSION.....40

APPENDIX

Opinion of Florida Supreme Court in Northeastern International Airways, Inc. and Arrow Air, Inc. v. Department of Revenue, June 14, 1984.....1a

Final Judgment of Circuit Court in Northeastern International Airways, Inc. and Arrow Air, Inc. v. Department of Revenue.....6a

Order of Florida Supreme Court in Northeastern International Airways, Inc. and Arrow Air, Inc. v. Department of Revenue, Denying Motion for Rehearing, September 12, 1984 .....20a

Opinion of Florida Supreme Court in Delta Airlines, Inc. v. Department of Revenue, June 14, 1984.....22a

Opinion of Florida Supreme Court in Eastern Air Lines v. Department of Revenue, June 14, 1984.....53a

Notice of Appeal to the United States Supreme Court.....80a

Proclamation by the Governor
of the State of Florida of
March 1, 1983.....84a

TABLE OF AUTHORITIES

PAGE

CASES

Allied Stores of Ohio v. Bowers, 350 U.S. 522 (1959).....30

Commonwealth Edison v. Montana, 453 U.S. 609 (1981)....39

Complete Auto Transit v. Brady, 430 U.S. 274 (1977).....27,35, 36,37, 40

Delta Air Lines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,915.....9,24

Eastern Air Lines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,949.....9,24

Evansville-Vanderburg Airport Authority v. Delta Airlines, Inc., 405 U.S. 707 (1972).....39

Ingels v. Morf, 300 U.S. 290 (1937).....39

Northeastern International

Airways, Inc. and Arrow Air Inc. v. Department of Revenue, _____ So.2d _____ (Fla.1984) Case Number 64,085.....9

Western and Southern Life Insurance Company v. State Board of Equalization, 451 U.S. 648 (1981).....30

CONSTITUTIONAL PROVISIONS

U.S.Const.art.I, §8.....passim

U.S.Const.amend.XIV.....passim

Fla.Const.art.III, §3.....17

STATUTES

Chapter 206, Fla.Stat.....17,18 19

§206.41(4)(a), Fla.Stat.....18

§206.45, Fla.Stat.....18

§206.46, Fla.Stat.....18

§206.85, Fla.Stat.....18

§206.875, Fla.Stat.....18

Chapter 212, Fla.Stat.....18

§212.08(4), Fla.Stat.....19

Senate Bill 8A (Chapter 83-3,
Laws of Florida).....passim

REGULATIONS

14 CFR, Part 121.....16

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No. _____

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

Northeastern International Airways, Inc. and Arrow Air, Inc. appeal from a Judgment of the Supreme Court of the State of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Florida (Northeastern International Airways, Inc. and Arrow Air, Inc. v. Department of Revenue), (Case Number 64,085) is reproduced at App.1a. It will appear as _____ So.2d _____ (Fla.1984). The companion cases referred to in that opinion are likewise reproduced as follows: Delta Air Lines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,915, App.22a; Eastern Air Lines, Inc. v. State of Florida, Department of Revenue, ____ So.2d ____ (Fla.1984), Case Number 63,949, App.53a; The opinion of the Trial Court is not reported, it is reproduced at App.6a.

JURISDICTION

i

This appeal is from an Order of the Supreme Court of the State of Florida denying Appellants' timely Motion for Rehearing. The Florida Supreme Court upheld the validity, against Appellants' constitutional challenges, of Senate Bill 8A (Chapter 83-3, Laws of Florida).

ii

The date of the entry of the Judgment or Decree sought to be reviewed (the Order of the Supreme Court of the State of Florida denying Appellants' timely Motion for Rehearing) is September 12, 1984. Appellants' timely filed Motion for Rehearing concerned an Order of the

Supreme Court of the State of Florida entered June 14, 1984. The Notice of Appeal to this Court was filed with the Clerk of the Supreme Court of the State of Florida on December 6, 1984.

iii

This appeal is taken pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §8, United States Constitution:

The Congress shall have Power To . . . regulate Commerce . . . among the several States . . .

Fourteenth Amendment, United States Constitution:

. . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Senate Bill 8A (Chapter 83-3, Laws of Florida):

(CODING: Words in struck through type are deletions from existing law; words underlined are additions.)

§212.08, Fla.Stat.

> Sales, Rental, Storage, Use Tax; Specified Exemptions.--The sale at retail, the rental, the use,

the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this Chapter.

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.--Also exempt are water (not exempting mineral water or carbonated water), and, all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein., ~~and~~ Motor fuels and special fuels ~~on which a tax is imposed by chapter 206 or chapter 207~~ are taxable as provided in part II. ~~All other fuels are taxable~~, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission ~~or by the Civil Aeronautics Board~~ to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in

interstate or foreign commerce are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the carrier's fiscal year. This ratio shall be applied each month to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter."

§212.70(3)(a)(b)(c), Fla.Stat.

(3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price

by the percentage change in the average monthly gasoline price commponent of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

STATEMENT OF THE CASE

Appellants, NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC., (both domestic U.S. corporations) are scheduled air carriers operating pursuant to operating certificates issued by the Federal Aviation Administration pursuant to 14 CFR, Part 121. Both Appellants maintain their principal place of business in the State of Florida and carry on their scheduled air carrier operations throughout the United States.

On March 1, 1983, a proclamation was issued by the Executive Department of the State of Florida, which provided in part that "the improvement of Florida's roads, bridges and highways

require increased funding and related statutory changes . . ." This proclamation is reproduced at App.84a. Based on this proclamation and the authority of Fla.Const.art.III, §3, the Governor of the State of Florida convened a special legislative session to consider this proposed funding. During this special session the legislature of the State of Florida ultimately approved Senate Bill 8A which became Chapter 83-3, Laws of Florida. Senate Bill 8A, among other things, altered the statutory scheme of taxation within the State of Florida in the following respects which are germane to this appeal:

1. Motor fuel and special fuels were historically taxed under Chapter

206, Fla.Stat., at the rate of 8¢ per gallon. The first 4¢ of the motor fuel tax had been identified as the First gas tax (§206.41(4)(a), Fla.Stat.), which funds have been committed exclusively to road construction and maintenance. (§206.45, Fla.Stat. and §206.46, Fla.Stat.). Likewise, the first 4¢ of the special fuel tax had been committed for the same purpose (§206.85, Fla.Stat. and §206.875, Fla.Stat.). Senate Bill 8A removes the First gas tax and the corresponding portion of the special fuel tax and imposes a five percent sales tax on motor fuel and special motor fuel under Chapter 212, Fla.Stat. However, the sales tax on fuel is not based upon the actual purchase price of the fuel, but

is based upon a pre-determined price of $1.148 per gallon.

This sales tax is not levied upon any common carrier except airlines due to a specific exemption in the Statute. These other common carriers continue to be taxed under Chapter 206 as before Senate Bill 8A.

2. Prior to the passage of Senate Bill 8A, all interstate and foreign common carriers (except motor carriers), (that is, railroads, vessels and airlines), paid a sales tax on the fuel purchased in Florida computed upon the prorated formula of §212.08(4), Fla.Stat. That formula was based upon a ratio of the intrastate mileage to the interstate or foreign mileage traveled by the carrier during the pre-

vious fiscal year. The net affect of this proration was to tax the interstate common carrier on motor fuel used within the State and to provide an exemption for the tax on motor fuel used outside the State. Senate Bill 8A removes the prorated formula for airlines only while continuing the prorated treatment reflecting intrastate consumption for all other interstate and foreign common carriers. That is, there is no proration of the fuel sales tax paid by airlines such as Appellants. Additionally, the tax on airlines is based upon the predetermined price of $1.148 per gallon, while the tax to railroads and vessels is based upon the actual sales price of their fuel.

3. Although Senate Bill 8A was to provide funds for transportation purposes, the funds are not being utilized for the construction of airport and airport facilities. Airport and airport facilities continue to be funded by the issuance of general revenue bonds. These bonds are redeemed by sinking funds generated though user fees (primarily landing fees), service fees, fuel surcharges and lease payments by the occupiers of the airports. In other words, the bonds are paid for by the airlines. For example, the $265 Million improvements presently being made at the Fort Lauderdale-Hollywood International Airport (the base of operations of Appellant Northeastern) are funded by a bond

issue. Appellant, Northeastern, has guaranteed the payment of those bonds along with the other occupiers of the airport. The bonds will be paid by increased landing fees and lease payments for space. The requirement of a guaranty by the occupiers of the airport was necessary as, without such guaranty, the underwriters would not have been able to market the bonds. Senate Bill 8A makes no change in this existing method of funding airport improvements.

Senate Bill 8A (Chapter 83-3, Laws of Florida) was signed into law by the Governor of the State of Florida on March 8, 1983, several days after the commencement of the special session. On March 11, 1983, the Appellant,

NORTHEASTERN INTERNATIONAL AIRWAYS, INC. brought an action in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (Case Number 83-05136 CA), which action sought declaratory relief with respect to the constitutionality of Senate Bill 8A (Chapter 83-3, Laws of Florida). The Trial Court ruled that Senate Bill 8A (Chapter 83-3, Laws of Florida), did not violate any provision of the United States Constitution. This determination of the Trial Court was challenged in the Supreme Court of the State of Florida which upheld the constitutionality of the portions of Senate Bill 8A which are challenged in this appeal.

The Florida Supreme Court did

strike from Senate Bill 8A a portion of that law granting a "credit" under the Florida income tax to certain Florida based air carriers. The Florida Supreme Court determined that portion of the Statute to be unconstitutional. That portion of the Florida Supreme Court's ruling is not challenged by Appellants in this appeal.

This appeal involves the same issues as are contained in Delta Airlines, Inc. v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,915, App. _____a, and Eastern Air Lines, Inc., v. State of Florida, Department of Revenue, _____ So.2d _____ (Fla.1984), Case Number 63,949, App. _____a. In both of the above cases,

Notices of Appeal have been filed with the Supreme Court of Florida to this Honorable Court. As the identical issues are presented by the above cases as are presented in this instant appeal, Appellants adopt by reference the Jurisdictional Statements submitted by Appellants, Delta Airlines, Inc. and Eastern Air Lines, Inc. as a part of this Jurisdictional Statement.

REASONS SUPPORTING PLENARY CONSIDERATION

Appellants challenge the constitutionality of Senate Bill 8A (Chapter 83-3, Laws of Florida) on two fronts. Firstly, Senate Bill 8A contains an unlawful and unconstitutional discrimination against Appellants and in favor of other common carriers in two respects. They are that other common carriers are permitted an exemption from the tax for their fuels which are purchased in the State of Florida, but consumed outside the State of Florida, and second, that the fuel utilized by other common carriers is, in effect, taxed at a different rate. Appellants maintain that the classification between themselves as airlines and other common carriers is arbitrary, unreaso-

nable, and furthers no legitimate State interest.

Secondly, Appellants show that Senate Bill 8A places an impermissable burden on interstate commerce contrary to the teachings of Complete Auto Transit v. Brady, 430 U.S. 274 (1977). This unconstitutional burden on interstate commerce is demonstrated in two ways. First, the tax is not "properly apportioned" to local activities within the taxing State, and secondly, the tax is not "fairly related" to the taxed activity.

The Florida Supreme Court in dealing with the constitutionality of Senate Bill 8A upholds the Statute, finding first that the classification between airlines and other common

carriers is appropriate because of an airline's "distinctive nature." This "distinctive nature" is the basis for the Florida Supreme Court's rejection of Appellants' equal protection arguments. Implicit in the Florida Supreme Court's reasoning is that there are "classifications" between the various common carriers, but that the classifications are justified.

The above reasoning of the Florida Supreme Court then becomes more difficult to fathom when the Florida Supreme Court upholds the Statute against a commerce clause challenge by indicating that the tax is "non discriminatory" and that "all purchasers" of fuel are taxed similarly.

The same facts cannot support the conclusion that first there is a rational classification between airlines and other common carriers and then also support the conclusion that there is no difference in the treatment of airlines and other common carriers when they are purchasing fuel.

I

Senate Bill 8A Establishes an Unconstitutional Classification Between Airlines and Other Common Carriers Both in the Imposition of the Tax and in its Method of Computation.

The Florida Supreme Court, in upholding Senate Bill 8A against Appellants' equal protection challenges opined that the classification created by the Statute was not hostile or oppressive and that the classification made by Senate Bill 8A is not

arbitrary. Clearly, a classification, in order to pass constitutional muster, must not be arbitrary and must rest upon a rational basis which promotes a legitimate State interest. Allied Stores of Ohio v. Bowers, 350 U.S. 522 (1959), and Western and Southern Life Insurance Company v. State Board of Equalization, 451 U.S. 648 (1981).

The classifications challenged by Appellants are twofold. Firstly, under the taxing scheme previously in existence under the State of Florida, tax on fuels such as those used by Appellants and other common carriers were assessed based upon a ratio of the number of miles traveled by a common carrier both within and without the

State of Florida. This proration, under Senate Bill 8A, continues for all other common carriers except airlines, thereby providing a competitive advantage to carriers which compete directly with airlines. It is submitted that this classification between airlines and all other common carriers is arbitrary and not founded upon the furtherance of any legitimate State interest. Airlines, such as Appellants, compete with all other common carriers for the carriage of persons and property. This competition should not be skewed by levying additional taxes upon one carrier thereby creating a competitive advantage in favor of another. Carriers, whether they be airlines, railroads, trucks or

vessels clearly should be treated equally with respect to the taxes imposed upon the fuels they consume. There is no legitimate State interest permitting a discrimination between and among these carriers.

Secondly, the provisions of Senate Bill 8A create a very subtle classification between the types of fuel utilized by Appellants and all other consumers. This is accomplished under the Statute by levying the tax upon fuels based upon an arbitrarily established price of $1.148 per gallon of fuel. This arbitrary establishment of a tax based upon five percent of $1.148 per gallon appears reasonable and fair on its face, however, the utilization of this arbitrarily

established price of $1.148 per gallon causes jet airplane fuel to be taxed at a much higher percentage than, for example, gasoline. Jet fuel (in reality kerosene) at the time of the consideration of this matter was sold for approximately 90¢ per gallon. unleasded gasoline was selling for a price of approximately $1.30 per gallon at the same time. The effect of taxing both fuels based upon five percent of the arbitrarily established figure of $1.148 per gallon resulted in an actual tax of approximately 4.4 percent and a tax on jet fuel of approximately 6.4 percent. The insidious nature of calculating the tax based upon a percentage of a pre-established price causes airlines in particular to pay a

much higher percentage of sales tax than other purchasers of fuel. Again, this classification against airlines and in favor of all other carriers, creates a competitive advantage in favor of the other carriers to the disadvantage of airlines. There is no rational basis for this classification.

Finally, Senate Bill 8A does not require railroads and vessels to pay the tax based on the arbitrarily adopted price of $1.148, but rather allows those carriers to be taxed based on their actual cost of fuel. This difference between railroads and airlines cannot be justified.

II

Senate Bill 8A Imposes an Unconstitutional Burden Upon Interstate Commerce in that the Tax Involved is not "Properly Apportioned" to Instate Activities

and is not "Fairly Related" to the Taxed Activity.

Senate Bill 8A (Chapter 83-3, Laws of Florida) clearly creates a burden upon interstate commerce. The constitutionality of such burden has been considered by this Court in Complete Auto Transit v. Brady, 430 U.S. 274 (1977), which announced a four-prong test to determine if a State taxing scheme passed constitutional muster when considered in light of the Commerce Clause. The taxing scheme is to be scrutinized to determine the practical effect of the taxing scheme. The taxing scheme adopted by Senate Bill 8A (Chapter 83-3, Laws of Florida) runs afoul of the Complete Auto, Id. test in two respects. They are first, that the tax is not "properly

apportioned" and secondly, that the tax is not "fairly related" to the taxed activity.

One of the tests established in Complete Auto, Id. is that a taxing scheme would not pass constitutional muster if the tax was not "properly apportioned" to local activities within the taxing State. Such an apportionment existed for airlines under the taxing scheme altered by Senate Bill 8A and, continues to exist under the taxing scheme adopted by Senate Bill 8A for all other carriers except the airlines. An apportionment based upon mileage traveled both within and without the State of Florida would satisfy the second test of Complete Auto, Id. Indeed, Senate Bill 8A does

continue that apportionment for all other common carriers. The infirmity in the Statute is that the apportionment has been deleted for Appellants and other airlines similarly situtated. Accordingly, the Statute fails.

Senate Bill 8A, also runs afoul of the fourth aspect of the Complete Auto, Id. Test. That is, the tax imposed upon the airlines for their fuel needs is not "fairly related" to the services provided by the State. The tax levied under Senate Bill 8A falls squarely upon the airline. The services provided by the taxes, on the other hand, are to go to fund the repair of the "accelerating deterioration of (Florida's) transportation system: roads, expressways, bridges and public

transit." Governor's Proclamation, App.84a. and "to fund the construction and maintenance of Florida's transportation system: roads, bridges, expressways and public transit." Preamble to Senate Bill 8A. If a levy is for the general revenue it need not be fairly related to specific services, however, if the taxing statute is designed to raise revenue for a specific (as opposed to general) state need, the tax must be reasonably related to the services provided if such taxes are going to be a burden on interstate commerce. The State cannot arbitrarily impose a user tax upon airlines without regard to the "fairness" of the tax on the taxpayer. Evansville-Vanderburg Airport Authority vs. Delta Airlines,

Inc., 405 U.S. 707 (1972), Commonwealth Edison vs. Montana, 453 U.S. 609 (1981), and Ingels vs. Morf, 300 U.S. 290 (1937).

Accordingly, since this tax is to be used for a special purpose (i.e., repair of roads, bridges, etc.) the tax must be fairly related to the object of the special purpose (repair of roads, etc.). Since the Appellants are airlines they obviously do not use the roads and bridges. Therefore, the relationship required by Complete Auto, is lacking and Senate Bill 8A must fail.

CONCLUSION

For the foregoing reasons, this Court should require plenary consideration of this appeal, with briefs on the merits and oral argument.

Respectully submitted,

THOMAS F. LUKEN
Attorney for Appellants
1290 E. Oakland Park Blvd., #200
Fort Lauderdale, Florida 33334
(305)561-9500

Dated December 10, 1984.

APPENDIX

SUPREME COURT OF FLORIDA

No. 64,085

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., et al., Appellants,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

We have before us an appeal which results from an order by the Fourth District Court of Appeal certifying the issues involved to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

The case arose with the filing of a complaint in circuit court in Broward County. Northeastern International Airways, Inc., and Arrow Air, Inc., challenged the constitutionality of chapter 83-3, Laws of Florida. The circuit court entered an order of final judgment upholding the constitutionality of chapter 83-3. The plaintiffs challenged the constitutionality of chapter 83-3 but did not argue for exemption on the basis of international agreements entered into by the United States. The circuit court granted a motion for summary judgment against the plaintiffs thereby upholding the constitutionality of the law.

We have dealt with the issues

raised here in our decisions in Eastern Air Lines, Inc. v. Department of Revenue, No. 63,949 (Fla. June 14, 1984); Delta Air Lines, Inc. v. Department of Revenue, No. 63, 915 (Fla. June 14, 1984); Department of Revenue v. Wardair Canada Ltd., No. 64,036 (Fla. June 14, 1984); and Department of Revenue v. Air Jamaica Ltd., No. 64,035 (Fla. June 14, 1984).

Accordingly we affirm in part and reverse in part the order of the circuit court. We determined in Delta that the portion of chapter 83-3 which provided a tax credit to Florida-based airlines was unconstitutional. We also determined that it was severable and that it was stricken from the law. The remainder of the order is affirmed.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON and SHAW, JJ., Concur
McDONALD, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal from the Judgment of Trial Court in and for Broward County, Miette K. Burnstein, Judge, Case No. 83-5136 - Certified by the District Court of Appeal, Fourth District, Case No. 83-1587

Thomas F. Luken, Fort Lauderdale, Florida,

for Appellants

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-05136-CA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., a foreign corporation, and ARROW AIR, INC., a foreign corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.

FINAL JUDGMENT

This Court has heretofore entered its Order in the above captioned matter granting Motion for Summary Judgment filed by the Defendant and holding that Senate Bill 8A, Chapter 83-3, Laws of Florida was constitutional and valid in

all respects; at the final hearing the parties agreed and stipulated with regard to all evidentiary matters and no other factual matters remain outstanding to be considered by this Court. Whereupon, Final Judgment may now be entered in favor of the Defendant.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. This Court's Order of date July 1, 1983 is hereby incorporated herein and made a part hereof of this Final Judgment.

2. Senate Bill 8A, Chapter 83-3, Laws of Florida, is hereby found to be constitutional and valid.

3. The Motion for Summary Judgment filed herein by Plaintiffs is hereby

denied.

4. Final Judgment is hereby entered in favor of the Defendant and the Defendant shall go hence without day.

Done and Ordered in Chambers this 22 day of July, 1983.

/S/
MIETTE K. BURNSTEIN
Circuit Judge

Copies Furnished:

Thomas F. Luken, Esquire
Jim Smith, Esquire, Attorney General
Mitchell D. Franks, Esquire
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 83-05136 CA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., a foreign corporation, and ARROW AIR, INC., a foreign corporation,
Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

O R D E R

THIS CAUSE, focusing on the question of constitutionality of Senate Bill 8A, was heard on cross Motions for Summary Judgment.

Senate Bill 8A revises portions of the taxing statutes, Chapters 206, 212, and 220, Florida Statutes,

regarding aviation fuel by: (1) removing previously allowed prorations to interstate air carriers, reducing their sales tax proportionately to miles travelled outside the State while continuing such prorations for other non-highway interstate carriers (2) allowing a one-half offset against State corporate income tax only to air carriers having a corporate office and over 1200 employees within the State, and (3) assessing tax on aviation fuel at 5% on an initial set price of $1.148 per gallon while leaving the tax on other non-highway interstate carriers at 5% of actual sales price.

Plaintiffs, Northeastern International Airways, Inc, and Arrow Air, Inc., both foreign air carriers

with corporate offices, but less than 1200 employees, within the State, claim discriminatory practices in the bill's "arbitrary and unreasonable" classification of non-highway interstate commercial carriers in general, of aviation carriers specifically, and of aviation, as contrasted with other fuels, thus violating the equal protection clauses of the United States and Florida Constitutions. They also claim that Senate Bill 8A constitutes an impermissible taxation of an interstate business so as to violate the commerce clause of the United States Constitution.

Senate Bill 8A expresses the legislative intent of F.S. §212.05 - as a taxation upon "... the privilege of

doing business ..."

and

(1) "For the exercise of such privilege, a tax is levied on each taxable transaction or incident ...".

F.S. §212.70(1) goes on to delineate the manner of imposition:

"... a tax shall be imposed for the privilege of the sale at retail in this state of ... special fuel ... [2a] ... paid upon the first sale or transfer of title within this state ...".

There is little doubt but that this tax is levied upon the privilege of selling aviation fuel (or upon its first withdrawal). It is not a "user" fee levied upon the use of a particular facility or service. It is not such a tax designed to distribute the burden of maintaining a facility among those utilizing that facility such as airport

landing fees.

> "... Florida sales tax, being an excise tax is not subject to the constitutional requirements of equality and uniformity. Rather, the constitutional test to be applied to such a tax is whether the classifications created by such tax are reasonable and not arbitrary". Estate of W. T. Grant Company v. Lewis, et al, 358 So.2d 76 (Fla. 1st DCA 1978).

Plaintiffs urge that the disparity of treatment between non-highway interstate carriers is arbitrary and unreasonable. It would appear, however, that certain tax structures already treat airlines differently, e.g. the exemption from ad valorem taxes on the lease of governmental property pursuant to Chapter 80-368, a generally more favorable situation to air carriers than to other non-highway interstate carriers. While it is true

that air carriers do pay an intangible tax on such leasehold interest such payments are upon the value of the leasehold and arguably substantially less than upon the ad valorem taxes based upon the value of the real property and its improvements. Just Valuation and Taxation League, Inc. v. Simpson, 209 So.2d 229 (Fla. 1968). This disparity of treatment was not challenged by Petitioners.

Defendant argues that the legislature did away with the credit for out-of-state mileage because of air carrier routing over the Gulf or ocean so as to defeat the tax imposed upon mileage travelled within the State. Although this reasoning can also be applied to vessels, it nonetheless implements a

legitimate legislative intent to close a loophole available to air carriers and is therefore another reasonable basis for a separate classification of them.

Plaintiffs assert that even all air carriers are not treated the same because of the corporate tax credit contained in F.S. §220.189 allowed only to air carriers maintaining or establishing "... its corporate or business home office in this state and which maintains a work force within this state or more than 1200 employees".

Defendant argues that such provision is designed to promote intrastate employment and therefore is a legitimate objective of legislature.

The Court is more persuaded by the stipulation of both counsel for Plaintiffs and defendant that no airline has paid a state corporate income tax within the past five years, nor is such tax payment reasonably certain to occur in the immediate future.

> "... one will not be heard to question the constitutionality of a legislative enactment except insofar as he may be able to show that it adversely affects him." Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950).

The Plaintiffs challenge the setting of an "arbitrary" price per gallon of aviation fuel as being violative of due process. The expressed legislative intent to facilitate the collection in a manner least likely to increase public and private costs of tax collection and administration is

set forth in F.S. §212.6C(1).

Utilizing an initial price based upon an average approximation per gallon is a legitimate method of facilitating collection and such procedure is not, on its face, unconstitutional. Such provision applies to all purchasers and users of aviation fuel and thus cannot be said to be oppressively discriminatory. Markham v. Yankee Clipper Hotel, Inc., 427 So.2d 383 (Fla. 4th DCA 1983).

Tax on gas used or sold in the state (including gas imported for use upon its withdrawal from storage tanks) is not an unconstitutional burden on interstate commerce. Edelman v. Boeing Air Transport, Inc., 389 U.S. 249 (1933); Eastern Air Transport v. South

Carolina Tax Commission, 285 U.S. 147 (1932); United Air Lines, Inc. v. Mahin, 410 U.S. 623, 35 L.Ed^2 545, 93 So.Ct. 1186 (1973 Sup.Ct.).

The Plaintiffs, conceding that there are no contested material issues of fact, have failed to meet their heavy burden of proving a taxing statute's unconstitutionality.

In granting the Defendant's Motion for Summary Judgment this Court recognizes the ruling of its sister court: Delta Air Lines, Inc., et al, v. State of Florida, Department of Revenue, #83-761, Second Judicial Circuit In and For Leon County, Florida.

The Defendant's Motion for Summary Judgment be, and the same is hereby,

granted, this 1st day of July, 1983, in Fort Lauderdale, Broward County, Florida.

/S/ Miette K. Burnstein
Miette K. Burnstein,
Circuit Judge

Copies furnished:

Thomas F. Luken, Esquire
Jim Smith, Esq., Attorney General
Mitchell D. Franks, Ewq.
Joseph C. Mellichamp, III, Esq.
Larry Levy, Esq.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 12, 1984

CASE NO. 64,085

Circuit Court Case No. 83-5136
(Broward)

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., et al.,

Appellants,

vs.

DEPARTMENT OF REVENUE,

Appellee.

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
CC: Hon. Robert E. Lockwood, Clerk
Hon. Miette K. Burnstein, Judge

Thomas F. Luken, Esquire
Joseph C. Mellichamp, III, Esquire
Larry Levy, Esquire

SUPREME COURT OF FLORIDA

No. 63,915

DELTA AIR LINES, INC., et al.,
Appellants,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Delta Air

Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in Eastern Air Lines v. Department of Revenue, No. 63,949 (Fla. June 14, 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of Chapter 83-3

creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not per se invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 1977); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938). Taxes have been sustained

against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. Complete Auto, 430 U.S. at 279. No state may, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). This principle follows from the basic purpose of the commerce clause which is

to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. Boston Stock Exchange, 429 U.S. at 329; Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

In Boston Stock Exchange the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the

number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332.

Another tax statute whose disciminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in Maryland v. Louisiana, 451 U.S. 725 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and

development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the discriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759.

The circuit court here found that "the tax is on fuel purchased in the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in Maryland v. Louisiana. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this

tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a direct commercial advantage to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found Boston Stock Exchange inapplicable stating that, in the present case, "the legislature is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in Boston Stock Exchange. The United

States Supreme Court in Boston Stock Exchange was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored in-state business and discriminated against interstate commerce.

The circuit court also relied on Archer Daniels Midland Co. v. State, 315 N.W.2d 597 (Minn. 1982). In Archer Daniels the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemp-

tion for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. Id. at 599. The circuit court ruled that Arthur Daniels dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or

consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to Faircloth v. Mr. Boston Distiller Corporation, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The

court's reliance on Faircloth is misplaced, because that case involved a challenge to a state excise tax based upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In Eastern, No. 63,949 (Fla. June 14, 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220.189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose--to tax corporations qualified to do business in Florida or actually doing business

in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an excise tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's argument is that this tax is a user tax and, as such, fails the fourth prong of the text enunciated in Complete Auto. Delta argues that it and other interstate air common carriers do not

use the roads in Florida and, therefore, the measure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. All purchasers of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has

asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933). The proceeds of the tax were to be used solely in the construction and maintenance of a highway system in the state. The

appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. Id. at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective use as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbid-

> den in Helson v. Kentucky, supra. Here the tax is imposed on the successive exercise of two or those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and reremote from the function of interstate commerce itself to transgress constitutional limitations. . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268.

In Eastern Air Transport, Inc. v. South Carolina Tax Commission, 285 U.S. 147 (1981), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a

direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153.

Similarly, the Court upheld a Wyoming Law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1932). The Court described the tax in the following manner:

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A state may validly tax the "use to which gasoline is put in

> the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in Helson v. Kentucky, 279 U.S. 245, 73 L. ed. 683, 49 S. Ct. 279." As the exercise of the powers taxed, the storage and withdrawal from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax

does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. Nashville, Chattanooga & St. Louis Railway v. Wallace, 288 U.S. 249, 269 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940). See also Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625 (1981); General Motors Corp. v. Washington, 377 U.S. 436, 440-41 (1964). The relevant inquiry under the

fourth prong of the Complete Auto test is not, as Delta seems to suggest, the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. Commonwealth Edison, 453 U.S. at 625. The first prong of Complete Auto clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before any tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. Id. at 626; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc., 405 U.S. 707 (1972). In Evansville-Vanderburgh the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in Commonwealth

Edison where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of Complete Auto. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621. The Court also concluded that the fourth prong of Complete Auto was satisfied by the Montana tax. The

Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626 (citing General Motors Corp. v Washington, 377 U.S. at 440-41).

We believe the imposition of this excise tax on the purchase of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of

Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce

clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-761 - Certified by the District Court of Appeal, First District, Case No. AT-266

J. Michael Huey and Stephen A. Ecenia of Akerman, Senterfitt and Eidson, Tallahassee, Florida, for Delta Air Lines, Inc.; and Darrey A. Davis and Juan T. O'Naghten of Steel, Hector and Davis, Miami, Florida, for Pan American World Airways, Inc.,

Appellants

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Tallahassee, Florida,

for Appellee

SUPREME COURT OF FLORIDA

No. 63,949

EASTERN AIR LINES, INC., Appellant,

v.

DEPARTMENT OF REVENUE, Appellee.

[June 14, 1984]

ADKINS, J.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. v, §3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon

county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitution, was an institutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pendency of the proceedings subject to certain conditions.

The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eli-

minates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, § 5 (amends §

212.08(4), Fla. Stat. (Supp. 1982).

Section 4 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.--Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not

apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to

their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated

usurpetion of power will authorize judicial interference with legislative action. Walters v. City of St. Louis, 347 U.S. 231 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. Madden v. Kentucky, 309 U.S. 83 (1940); Just Valuation & Taxation League, Inc. v. Simpson, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. Department of Revenue v. AMREP Corp., 358 So.2d 1343, 1349 (Fla. 1979). A statute that discriminates in

favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. Allied Stores v. Bowers, 358 U.S. 522 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classifi-

ciation drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> § 212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.--
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the recall price per gallon of motor fuel and special fuel as follows:
>
> (a) The department shall determine the appropriate total

> motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.
>
> (b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.
>
> (c) The initially established price is $1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first

withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes as improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions,

the Secretary of Labor has broad powers to collect, collate and report statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seem wise." 29 U.S.C. § 2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in Gindl v. Department of Education, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from Gindl because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the depart-

ment, inarriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in State v. Welch. 279 So.2d 11 (Fla. 1973).

In State v. Welch, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to

include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. § 404.515, Fla. Stat. (Supp. 1972). In Welch this Court looked to the rule of law announced in Freimuth v. State, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislature power for the legislature to adopt in advance any federal act or the ruling of any federal administrative

body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. Id.

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to

determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of Welch and Friemuth should be interpreted to apply to statutes which incorporates federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined after the effective date of the act. In Gindl we upheld a

statutory provision which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of

appropriation in chapter 83-3 is equivalent to the method approved in Gindl.

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> § 212.92 Refunds.--
> (e) Refund to farmers and fishermen.--
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any

vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.

2. For the purposes of this paragraph, 'commercial fishing purposes' shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to

challenge chapter 83-3's full refund provision, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the fishing or farming business and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In State ex rel. Clarkson v. Philips, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionaity of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a pro-

vision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. Cramp v. Board of Public Instruction, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. Kass v. Lewin, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in Presbyterian Homes of Synod v. Wood, 297 So.2d 556 (Fla. 1974), wherein the Court states:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the legislature would

> have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit would.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD

AND SHAW, J.J., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-855 - Certified by the District Court of Appeal, First District, Case No. AT-359

Joseph F. Jennings of Kimbrell, Hamann, Jennings, Womack, Carlson and Kniskern, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and

Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT
STATE OF FLORIDA

Case Number 64,085

NORTHEASTERN INTERNATIONAL AIRWAYS, INC. and ARROW AIR, INC.,

Appellants,

vs.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.
_____/

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that NORTHEASTERN INTERNATIONAL AIRWAYS; INC., and ARROW AIR, INC., the Appellants above, hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of

Florida denying Appellants' Motions for Rehearing and affirming, in part, the Circuit Court's Judgment upholding the constitutional validity of Chapter 83-3, Laws of Florida, which Final Order was entered in this Court on September 12, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2), and a copy of this Notice of Appeal is being concurrently filed in the Circuit Court in and for Broward County, Florida.

Dated this 5th day of December, 1984.

/s/ THOMAS F. LUKEN

THOMAS F. LUKEN
Attorney for Appellants
1290 E. Oakland Park Blvd.
Ft. Lauderdale, FL 33334
(305)561-9500

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA)
ss:
COUNTY OF BROWARD)

I, THOMAS F. LUKEN, depose and say that I am attorney of record for Plaintiffs/Appellants, Northeastern International Airways, Inc., and Arrow Air, Inc., and that on December 5, 1984, pursuant to the Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein as follows:

On Defendant/Appellant, STATE OF FLORIDA, DEPARTMENT OF REVENUE, by mailing copies to LARRY E. LEVY, General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida

32301; and to JOSEPH C. MELLICHAMP, Assistant General Counsel, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

All persons required to be served have been served.

/s/ THOMAS F. LUKEN
THOMAS F. LUKEN

SWORN TO AND SUBSCRIBED before me this 5 day of December, 1985.

/s/ JEAN E. FEE
NOTARY PUBLIC

PROCLAMATION

State of Florida
Executive Department
Tallahassee

TO THE HONORABLE MEMBERS OF THE FLORIDA SENATE AND THE HOUSE OF REPRESENTATIVES:

WHEREAS, the State of Florida is experiencing an accelerating deterioration of its transportation system: roads, expressways, bridges and public transit; and

WHEREAS, the cost of rebuilding Florida's roads, expressways and bridges is approximately six times greater than the cost of adequately maintaining them; and

WHEREAS, the timely and strategic construction of new transportation corridors is a primary tool for shaping patterns of orderly population growth; and

WHEREAS, the provision of adequate urban public transit facilitates an orderly growth program for Florida's urban areas and diminishes the development pressures on agricultural and environmentally sensitive land; and

WHEREAS, the provision of adequate transportation funding and planning is

a paramount factor for businesses as they decide to relocate or expand in Florida; and

WHEREAS, thousands of jobs for Floridians and millions of dollars in Florida payrolls could be lost without adequate financing for Florida's transportation needs; and

WHEREAS, the improvement of Florida's roads, bridges and highways will require increased funding and related statutory changes;

NOW, THEREFORE, I, BOB GRAHAM, Governor of the State of Florida, by virtue of the power and authority vested in me by Article III, Section 3(c)(1), Florida Constitution, do hereby proclaim as follows:

Section 1.

That the Legislature of the State of Florida is convened in Special Session commencing at noon, Tuesday, March 1, and extending through 6:00 p.m. Wednesday, March 2, 1983.

Section 2.

That the Legislature of the State of Florida is convened for the sole and exclusive purpose of considering the following matters:

(a) Amendment of Chapter 212, Florida Statutes, to remove the sales tax exemption on Motor and Special Fuel and amendment of Chapter 206, Florida Statutes, repealing the first gas tax.

(b) Amendment of Chapter 320, Florida Statutes increasing Motor Vehicle Tag fees and reallocating Motor Vehicle License Tag Revenue.

(c) Amendment of Chapter 206, Florida Statutes, to allow a local option Motor Fuel Tax.

(d) Amendment of Chapter 212, Florida Statutes, to repeal the partial exemption for fuel purchases.

(e) Amendment of those sections of Florida Statutes necessary for the implementation of the foregoing.

(f) A bill requiring a performance audit and management review of operations of the State Department of Transportation.

(g) A bill providing a repeal of Section 20.23(3), Florida Statutes, unless reenacted by October 1984 after presentation

and consideration of performance audits and management reviews.

(h) Amendment of 1982-83 General Appropriations Act.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed to this Proclamation convening the Legislature in Special Session at the Capitol, this 16th day of February 1983.

(SEAL)

BOB GRAHAM
Governor

ATTEST:

GEORGE FIRESTONE
Secretary of State

(1)

Office - Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-921

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC.,

Appellants,

v.

THE FLORIDA DEPARTMENT OF REVENUE and THE STATE OF FLORIDA,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

LARRY E. LEVY
P. O. Box 10583
Tallahassee,
Florida 32302
(904) 224-1215

Counsel of Record
for Appellee

JIM SMITH
Attorney General

JOSEPH C. MELLICHAMP, III, Assistant Attorney General
The Capitol
Tallahassee, Fl.
(904) 487-2142

Attorneys for Appellee, The Florida Department of Revenue and the State of Florida

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....(i-ii)

TABLE OF AUTHORITIES.....(iii-v)

MOTION TO DISMISS OR AFFIRM.....1

STATEMENT.....2

POINTS I & II.....9

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

PAGE

A. THE TAX IS AN EXCISE.....10
TAX, NOT A USER FEE

B. INTERSTATE COMMERCE.....16

C. EQUAL PROTECTION CLAUSE..30

Conclusion.....31

TABLE OF AUTHORITIES

Cases: Page

Allied Stores of Ohio v. Bowers...24, 30
358 U.S. 522 (1959)

Carmichael v. Southern Coal &
Coke Co.....19, 24, 27, 30
301 U.S. 495 (1937)

Commonwealth Edison Co. v. State of
Montana.....15, 16, 18, 22, 24, 26, 28
453 U.S. 609 (1981)

Complete Auto Transit, Inc.....16, 17
v. Brady.....23. 24, 28
430 U.S. 274 (1977)

Eastern Airlines v. State of 25
Florida, Department of Revenue
455 So.2d 311 (1984) reh. den.

Edelman v. Boeing Air 11, 12, 29
Transport, Inc.
289 U.S. 249 (1933)

Estate of W. T. Grant Co. 3
v. Lewis
358 So.2d 76 (Fla. 1 DCA 1978)
370 So.2d 764 (Fla. 1979)

CASES: PAGE

Florida Revenue Commission v. Maas Brothers, Inc. 226 So.2d 849 (Fla. 1 DCA 1969) Cert. den. 237 So.2d 177 3

Gaulden v. Kirk 47 So.2d 567 (Fla. 1950) 2, 10

Green v. Panama City Housing Authority 115 So.2d 560 (Fla. 1959) ...3, 10

Kirk v. Western Contracting Co. 216 So.2d 503 (Fla. 1 DCA 1968) Cert. den. 225 So.2d 535 App. dism. 226 So.2d 815 3

Madden v. Kentucky 309 U.S. 83 (1948) 24, 30

Nashville, Chattanooga & St. Louis Railway v. Wallace 288 U.S. 249 (1933) .....20, 24, ...29, 30

Ryder Truck Rental v. Bryant 170 So.2d 822 (Fla. 1964) ...3, 10

United Airlines v. Mahin 410 U.S. 623 (1973) ...11, 12, 14, ...29

United States v. Burnison 339 U.S. 87 (1950) 14

Laws of Florida: Page

Chapter 80-368, Laws of Florida.....6

Chapter 83-3, Laws of Florida... 2,4,6,7,18

§61, Chapter 83-3, Laws of Florida...2

Florida Statutes:

Chapter 206, Fl. Stat...3, 4, 5, 7, 8, 21

Chapter 207, Fl. Stat.....3, 4, 5, 7, 22

§207.005(2), Fl. Stat.....5

Chapter 212, Fl. Stat...2, 3, 4, 6, 8, 9, 10, 11, 14, 17, 18,23

§212.08(4), Fl. Stat.....4, 5, 6, 8

§212.08(9), Fl. Stat.....6

§212.70(2), Fl. Stat.....27

§212.92, Fl. Stat.....32

Part II, Ch. 212, Fl. Stat.....7

MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellants have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellants argue strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, Appellants submitted no evidence and testimony with regard to same in the Trial Court. The Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute, the Trial Court rejected this contention both factually and legally.[1] Even if such were a factual issue, it has been resolved against

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[1] Delta Air Lines, Inc., v. State of Florida, Department of Revenue Case No. 84-929

the evidence and testimony presented by the Appellants, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

Virtually all of the Appellants' argument is premised on the false assumption that the taxes imposed under Chapter 212, Florida STatutes, are user fees. This is not, and never has been true.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES

OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Both these points will be considered together.

A. THE TAX IS AN EXCISE TAX, NOT A USER FEE.

The highest Court in Florida has construed the statute, Chapter 212, Florida Statutes, as a statute imposing a tax on vendors for the privilege of engaging in business and exercising the taxable events and transactions provided for therein. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959); Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964). This determination by the Florida Supreme Court is consistent with similar determinations

which have been made by this Court on numerous occasions when analyzing and determining the type of tax imposed by state law and in determining the legal incident which gives rise to such tax. See Edelman v. Boeing Air Transport,Inc., 289 U.S. 249 (1933), Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932) and United Airlines v. Mahin, 410 U.S. 623 (1973).

In Eastern Air this Court considered a statute extremely similar to Chapter 212, Florida Statutes. (See footnote at page 151 of said decision, where the statute is quoted in its entirety.) In that case, the Court pointed out that the tax was imposed against the dealer for the privilege of carrying on the business of selling

gasoline within the state. In Boeing Air, the tax was imposed at the time the gasoline was withdrawn from the tanks for use in the aircraft. The statute in the case at bar imposes a tax on the legal incident of sale or transfer and collects same on such first sale or transfer which is generally the first withdrawal from storage for use. In the Mahin case, the tax involved was a general revenue use tax applying to the privilege of using tangible personal property in the state. The tax involved in that case, was imposed on the legal incident of storage or withdrawal from storage of the fuel. This Court upheld the state taxes in all such cases and the decision of the Florida Supreme Court in the instant case has reached a

similar conclusion in upholding the Florida statute. Thus, the Florida Supreme Court's decision is consistent with the decisions of this Court interpreting similar statutes from other states. Accordingly, this appeal does not present a substantial federal question, and based on the decisions reached by this Court in the aforementioned cases, it is manifest that the questions on which the decision in this cause depend are so insubstantial as not to need further argument. This Court has held that on appeal from a State Court judgment in an action challenging the constitutionality, the United States Supreme Court will defer to the State Court's determination that the taxable event is storage rather than the consumption of the fuel, where

there is no reason to ignore or to disagree with such determination. United Airlines v. Mahin, 410 U.S. 623 (1973); United States v. Burnison, 339 U.S. 87 (1950). In this case, the Supreme Court of Florida has construed the tax imposed under Chapter 212, Florida Statutes, as an excise tax, imposed on the vendor for the privilege of engaging in business, and has held, based on the statutory language, that the tax is imposed on the incident of the first sale or transfer within the State, which generally occurs on the first withdrawal or withdrawal for use from storage of the fuel. This is significant because the Appellants' argument is premised on the statement that the Supreme Court of Florida erred in concluding that the tax imposed

was a sales tax imposed on the vendor for the privilege of engaging in business, instead of a user fee. The cases cited by the Appellants are cited for authority premised on the false assumption that the tax imposed is a user fee.

This Court in its decision in Commonwealth Edison Company v. State of Montana, 453 U.S. 609, (1981) pointed out the distinction and stated that those cases in which the Court reviewed challenges to "user" fees or taxes must be put aside and cited the case relied upon by the Appellants, Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). The decision of the Florida Supreme Court recognized this distinction, and cited both the Montana

case, and the Evansville case, and properly applied the distinction as drawn by this Court in the Montana case. Thus, the Florida Supreme Court's decision is consistent with this Court's prior decisions in both cases. It specifically held that the tax was unlike the true "user fee" or "user tax". The Florida Supreme Court's determination that the involved tax is an excise tax and not a user fee, should be binding and controlling on this issue.

B. INTERSTATE COMMERCE

The Florida Supreme Court's determination that the tax is an excise tax and not a user fee is actually decisive in part of the Appellants' argument with regard to the four prong test cited in Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977). The Florida Supreme Court's decision cites the Brady case, listed each

of the four prongs and considered and applied each of same adversely to the contentions argued by the Appellant. Appellants contended that the tax offended the last two prongs of the test set forth in Brady, in that it discriminated against interstate commerce and was not fairly related to the services provided by the State. The Florida Supreme Court rejected this, and properly so.

The Appellants' contention that the tax is not fairly related to the services provided by the State misconceives the nature of the tax imposed under Chapter 212, F.S., and is premised on the false assumption that the imposition is a user fee instead of an excise tax. This has

been discussed previously and it has been pointed out that under this Court's previous decisions, no specific inquiry is required into whether or not the tax is fairly related to the services provided by the State, where the State must demonstrate a specific or direct benefit flowing when, as in the instant case, the tax is a general revenue tax such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, supra. In this Court's decision in the Montana case, it recognized that the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

This Court reached a similar decision in the case of Carmichael v. Southern Coal & Coke Company, 301 U.S. 495 (1937), so the Appellants' contention that a specific judicial inquiry is required in which an amount of specific benefit may be ascertained, has already been foreclosed and resolved against the Appellants' contention by this Court in other decisions. The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly no substantial federal question exists.

With regard to the Appellants' contention that the statute singles out airlines and classifies them improperly, this contention too has already been re-

solved by decisions of this Court adverse to the contentions of the Appellants. In this Court's decision in Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933), the Supreme Court upheld a state statute imposing an excise tax on the privilege of engaging inthe gasoline business, the proceeds of which were used solely for construction and maintenance of highways. The railway contended that since it was a railway and did not use the state highway system, that the statute discriminated against it. The rail carrier purchased large quantities of gasoline outside of the State of Tennessee and brought them into the State in tank

cars from which it was unloaded and stored in the railway's own storage tanks. None was sold by the railway but all was withdrawn and used by it as a source of motor power in interstate railway operation in Tennessee, Kentucky, Alabama, or Georgia. The Court held that the allegations of the railway showing a heavier burden of taxation imposed upon railroads than upon common carriers by motor bus, fell short of alleging discrimination forbidden by either the Commerce Clause or the Fourteenth Amendment. Furthermore, it should be remembered that other competing carriers engaging in interstate commerce, are required to pay other taxes on purchases of fuel under Chapters 206 and

207, Florida Statutes, which are not imposed upon airlines. All airlines pay the same tax as would be imposed on an individual person purchasing fuel from a service station. This is so because the tax is on the first withdrawal or use and is collected on the first transfer, and since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Since this legal incident can occur only once, as this Court stated in Montana, there can be no question regarding apportionment or potential multiple taxation. Substantial nexus clearly exists and since there is no danger of multiple taxation, because the legal incident of withdrawal and first transfer can occur

only once, both the first and second prongs of the Brady test are met. Furthermore, there is no singling out interstate business because the same tax is imposed on the first transfer of fuel, whether it is to be used in intrastate, interstate or foreign commerce or transportation.

That a state may classify persons and property for tax purposes has been uniformly recognized by this Court in numerous of its decisions, many of which were cited and relied on by the Florida Supreme Court in its decision. Basically, the Appellant is contending that it should be allowed to apportion the taxes imposed under Chapter 212, Florida Statutes, but the Florida Supreme Court's decision that such was not required is amply supported by the decisions of this Court. See Allied Stores

of Ohio v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1948); Carmichael, Wallace, and Montana. Airlines certainly benefit from a good road transportation system, and as the Florida Supreme Court pointed out Appellant operates in many of the major airports throughout the State, operating a commercial airline for profit. The persons and property which are transported through the air by airlines do not come to rest at the airports, but must generally use the public roads and highways of the State in automobiles or trucks, or some other means of public transportation to arrive at their ultimate destination. The Florida Supreme Court applied all the prongs of the four prong test set forth in Brady in precisely the same manner as they have been applied by this Court in its decisions. Thus, the

Florida Supreme Court's decision is consistent with this Court's decisions and the federal question presented is plainly insubstantial. Furthermore, as the Florida Supreme Court noted in its' decision in Eastern Airlines v. State of Florida, Department of Revenue, 465 So.2d. 311 (1984), pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean which permits airlines to avoid the accumulation of intrastate mileage.

With regard to the Appellant's contention that the rate applied violates the Commerce Clause, this contention is wholly without merit. The statute imposes the tax at a fixed rate of 5% on a fixed price per gallon of $1.148. The purpose of this is because the tax can only be effectively

collected on its first withdrawal from storage or distribution and at that time the wholesalers do not know the ultimate retail price to be set by the retailers. Thus, by fixing a price per gallon, the statute can be readily administered and the tax collected. Furthermore, the Legislature could just as easily have established the rate at a fixed amount per gallon sold, such as 6 cents per gallon or 9 cents per gallon and although the price charged per gallon may differ, the amount of tax collected would be the same. In fact, a license tax imposing a flat rate of 6 cents per gallon was upheld by this Court in Eastern Air Transport. The Supreme Court's decision is consistent with this Court's pronouncement in the Montana

case which held that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution. As this Court recognized in Carmichael, administrative convenience and expense in the collection and measurement of the tax are alone a sufficient justification for the difference between treatment. §212.70(2), Florida Statutes, contains the legislative finding as to convenience and necessity. Thus, the Appellants' contentions are plainly insubstantial. All air transport and individual persons in Florida pay the same tax on the purchase of fuel in Florida without regard to the fact that the fuel may ultimately be used in a vehicle which may be leaving the State. This is so because the tax is on the first

withdrawal or use and is collected on the first transfer. Furthermore, since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Second, since the tax is an excise tax on the privilege of engaging in the business of selling special fuel and motor fuel, and not a user fee, it is not necessary to examine and determine if there is a direct benefit flowing to the Appellant. Thus, the Supreme Court's decision is squarely consistent with this Court's decision in Montana and in this Court's application of the four prong test set forth in Brady.

The Supreme Court's determination that

the tax is on the legal incident of withdrawal for use from storage is also consistent with this Court's decision in Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932), Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933), Nashville, Chattanooga, & St. Louis Railway v.Wallace 288 U.S. 249 (1933). and United Airlines v. Mahin, 410 U.S. 623. (1973) These cases recognized that the legal incident which gave rise to the taxes imposed was on the withdrawal from storage or use and sustained the taxes involved in all three cases. Thus, the Florida Supreme Court's decision is consistent with these prior United States Supreme Court decisions, and accordingly no substantial federal question

exists, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

C. EQUAL PROTECTION CLAUSE

The Florida Supreme Court held that no violation of the Equal Protection Clause occurred and this decision is consistent with the decisions of this Court dealing with legislative classification for tax purposes. The test to be applied in examining the state classification, has been set forth by this Court in several cases including Madden, Allied Stores, and Carmichael. The Florida Supreme Court cited and applied these cases. Furthermore, virtually the identical issue was before this Court in the Wallace case,

where the objection was made that a heavier burden of taxation was imposed upon railroads than upon common carriers by motor bus, and that the tax was earmarked for roads which the railroads did not use. As has been previously demonstrated herein, other common carriers traveling by road, water, or railway, pay fuel taxes which are not required to be paid by airlines, and do not enjoy certain relief from imposition of ad valorem taxes as is enjoyed by airlines.

The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly the questions raised are plainly insubstantial.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to

grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

LARRY E. LEVY
P. O. Box 10583
Tallahassee
Florida 32302
(904) 224-1215

Counsel of Record
for Appellee

JIM SMITH
Attorney General

Joseph C. Mellichamp
III, Assistant
Attorney General
The Capitol
Tallahassee, Fl.
(904) 487-2142

Attorneys for
Appellee, State of
Florida, Department
of Revenue

PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 1, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, NORTHEASTERN INTERNATIONAL AIRWAYS, INC., and ARROW AIR, INC., by mailing copies in duly addressed envelopes, with first class postage prepaid, to Thomas F. Luken, 1290 East Oakland Park Boulevard, #200, Fort Lauderdale, Florida 33334.

All parties required to be served have been served.

LARRY E. LEVY
P. O. Box 10583
Tallahassee, Florida 32302
(904) 224-1215

Counsel of Record
for Appellee

Supreme Court, U.S.
FILED
SEP 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3) (3) (4)

Nos. 84-921, 84-926 and 84-929

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Acting Solicitor General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JIM J. MARQUEZ
General Counsel
Department of Transportation
Washington, D.C. 20590

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QUESTIONS PRESENTED

1. Whether a sales tax imposed by Florida on aviation fuel purchased within that State violates the Interstate Commerce Clause.

2. Whether Florida's scheme of fuel taxation violates the Equal Protection Clause by treating airlines differently in some respects than other carriers.

3. Whether the Florida Supreme Court erred in determining that appellant in No. 84-926 lacks standing under Florida law to challenge the validity of a tax statute governing tax refunds to certain farmers and fishermen.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Discussion	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, No. 81-757 (July 3, 1984) ... 9
Boston Stock Exchange v. *State Tax Comm'n*, 429 U.S. 318 ... 5
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 ... 6, 7
Eastern Air Transport, Inc. v. *South Carolina Tax Comm'n*, 285 U.S. 147 ... 6
Edelman v. *Boeing Air Transport, Inc.*, 289 U.S. 249 ... 6
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 ... 7
Lehnhausen v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 ... 8
Madden v. *Kentucky*, 309 U.S. 83 ... 8
Metropolitan Life Ins. Co. v. *Ward*, No. 83-1274 (Mar. 26, 1985) ... 9
United Air Lines, Inc. v. *Mahin*, 410 U.S. 623 6

Constitution and statutes:

U.S. Const.:

Art. 1, § 8, Cl. 3:

Foreign Commerce Clause ... 7
Interstate Commerce Clause ... 4

Statutes – Continued:

Amend. XIV 4
Due Process Clause 4, 8
Equal Protection Clause 4
Fla. Stat. Ann. (West 1971):
§ 206.01 *et seq.* 2
§ 206.46 7
§ 212.05 2
§ 212.07 2
§ 212.08(4) 2, 4
Fla. Stat. Ann. (West Supp. 1985):
§ 206.46 7
§ 212.02(22) 3
§ 212.08(4) 3, 4
§ 212.62 ..... 3, 5
§ 212.62(3)(a) 3
§ 212.62(3)(c) 3
§ 220.189 4
1985 Fla. Laws 85-348:
§ 2 (to be codified at Fla. Stat. 206.9855) . 5
§ 3 5
§ 9 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-921

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-926

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-929

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-921 (J.S. App. 1a-4a) is unreported. The opinion of the Florida Supreme Court in No. 84-926 (J.S. App. 2-14) is reported at 455 So. 2d 311. The opinion of the Florida Supreme Court in No. 84-929 (J.S. App. 1a-12a) is reported at 455 So. 2d 317. The opinions of the Broward County Circuit Court (84-921 J.S. App. 6a-19a) and of the Leon County Circuit Court (84-926 J.S. App. 15-16; 84-929 J.S. App. 25a-37a) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-921 J.S. App. 20a; 84-926 J.S. App. 33; 84-929 J.S. App. 24a). Notices of appeal in the Florida Supreme Court were filed respectively on December 6, 1984 (84-921 J.S. 11; J.S. App. 80a-81a), on November 28, 1984 (84-926 J.S. App. 34-35), and on October 30, 1984 (84-929 J.S. App. 48a-49a). The jurisdictional statement in No. 84-921 was filed on December 10, 1984, and the jurisdictional statements in Nos. 84-926 and 84-929 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Florida for many years has imposed a variety of taxes on different types of fuel purchased within that State. Prior to April 1, 1983, gasoline and diesel fuel were subject to an excise tax at the flat rate of 8¢ per gallon. Fla. Stat. Ann. § 206.01 *et seq.* (West 1971). This tax was paid principally by individual motorists, bus lines, and trucking companies. Other carriers, such as railroads, maritime shipping companies, and airlines, were exempt from this tax. Instead, they paid the general sales tax—technically imposed on the seller for the privilege of doing business in Florida, but required to be passed on to purchasers—at a rate of 5% of the fuel's retail price. *Id.* §§ 212.05, 212.07. The sales tax, as applied to fuel purchased by these carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its total mileage for the previous fiscal year. *Id.* § 212.08(4)

Effective April 1, 1983, Florida amended its fuel tax regime in the following relevant respects:

(a) The scheme governing railroads and maritime shipping companies remained basically the same. They continued to pay the 5% general sales tax on the actual price of the fuel they purchased, and their tax continued to be prorated on a mileage basis.

(b) The scheme governing roadway users was changed considerably. Gasoline and diesel fuel remained subject to the flat excise tax, but the rate was reduced from 8¢ to 4¢ a gallon (84-926 J.S. App. 3). In addition, gasoline and diesel fuel were made subject, for the first time, to the 5% general sales tax (Fla. Stat. Ann. § 212.62 (West Supp. 1985)). Rather than being applied to the actual retail price, however, the 5% levy was applied in the case of gasoline and diesel fuel to an "initially established price" of $1.148 per gallon (*id.* § 212.62(3)(c)). This "initially established price" was to be adjusted for inflation beginning June 1, 1985 (*id.* § 212.62(3)(a)). No provision was made for prorating the sales tax, as applied to gasoline and diesel fuel, on the basis of mileage. See *id.* § 212.08(4). Thus, the aggregate tax burden on these items was effectively increased from 8¢ a gallon to 9.7¢ a gallon.

(c) The scheme governing airlines was also changed considerably. They remained exempt from the flat excise tax, and they remained subject to the 5% general sales tax. However, the method of computing their sales tax liability was assimilated to the newly-established method of computing the sales tax on gasoline and diesel fuel. That is, the 5% rate was applied, not to the actual retail price of jet fuel, but to an "initially established price" of $1.148 per gallon, the same figure used for diesel fuel and gasoline. See Fla. Stat. Ann. §§ 212.02(22), 212.62 (West Supp. 1985). And the mileage proration formula, while remaining in effect for railroads and maritime shipping companies, was re-

pealed in the case of airlines. Compare Fla. Stat. Ann. § 212.08(4) (West 1971) with Fla. Stat. Ann. § 212.08(4) (West Supp. 1985). Finally, a new credit against the State's corporate income tax was created, providing for an offset against that tax equal to one-half the carrier's fuel tax liability, up to a maximum credit of $5 million (*id.* § 220.189). This credit was made available only to air common carriers who had their home office in Florida and who maintained a work force of more than 1,200 employees in the State. *Ibid.;* see 84-929 J.S. App. 2a.

2. Appellants in these three cases are domestic airlines incorporated under the laws of various states and registered to do business in Florida (84-921 J.S. 1, 16; 84-926 J.S. 4; 84-929 J.S. App. 28a). Delta Air Lines, appellant in No. 84-929, has its home office in Georgia (J.S. 8). Northeastern International Airways and Arrow Air, appellants in No. 84-921, have their home offices in Florida but have fewer than 1,200 employees based there (J.S. App. 11a). Eastern Airlines, appellant in No. 84-926, has its home office in Florida and also has more than 1,200 employees based in that State. Appellants are principally engaged in interstate commerce, but also fly on some foreign routes (84-921 J.S. 16; 84-926 J.S. 4; 84-929 J.S. 8).

Appellants brought these actions in Florida trial court, challenging various aspects of the State's fuel tax regime under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Interstate Commerce Clause, and on miscellaneous state-law grounds (84-921 J.S. App. 10a-11a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 25a). The trial courts upheld the statute in all respects (84-921 J.S. App. 18a-19a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 36a-37a). The cases were certified directly to the Florida Supreme Court (84-921 J.S. App. 1a; 84-926 J.S. App. 2; 84-929 J.S. App. 2a), which affirmed in part and reversed in part.

It rejected appellants' federal constitutional challenges to the fuel tax itself (84-921 J.S. App. 1a-4a; 84-926 J.S. App. 2-13; 84-929 J.S. App. 2a, 6a-12a). However, it sustained a challenge, mounted by carriers other than Eastern, to the constitutionality of the income tax credit, holding that the credit "clearly discriminates against interstate commerce because [it] provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers" (84-929 J.S. App. 4a, citing *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977) (emphasis in original)). The credit provision was severed from the statute (84-929 J.S. App. 6a, 12a) and the statute as thus modified was sustained. The airlines have appealed the Florida Supreme Court's judgment insofar as it is unfavorable to them; Florida has not cross-appealed as to the constitutionality of the income tax credit.[1]

DISCUSSION

1. Appellants contend that Florida's sales tax on aviation fuel places an unconstitutional burden on interstate commerce, pointing out that the fuel they buy is consumed on interstate flights and that Florida's levy is no

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[1] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348. The amendments exempt aviation fuel from sales tax, but impose upon it a new excise tax in approximately the same amount. Compare *id.* §§ 2 and 3 with Fla. Stat. Ann. § 212.62 (West Supp. 1985). The invalidated income tax credit is replaced with a provision allowing refund of the new excise tax in an amount "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). Enactment of these amendments, which apply only prospectively (*id.* § 9), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985. We of course intimate no view as to the constitutionality of the 1985 amendments.

longer prorated to reflect that fact. This contention is insubstantial in light of this Court's decision in *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n*, 285 U.S. 147 (1932). The Court there upheld a nondiscriminatory, unapportioned sales tax as applied to aviation fuel purchased within South Carolina for use in interstate commerce, reasoning that the taxable event was sale of the fuel and that such sales were "purely intrastate transactions" (285 U.S. at 152). Accord, *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 629 (1973) (rejecting Commerce Clause challenge to state use tax as applied to aviation fuel "withdrawn from storage for consumption in an interstate vehicle"); *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 252 (1933) (same).

Appellants attempt to dismiss these cases as "out-of-date" (84-929 J.S. 13-14) because they were decided under the "direct burden" approach to interstate commerce which this Court abandoned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). However, the "direct burden" approach was a doctrine that had been used mechanically to *strike down* state laws which, as drafted, technically imposed a levy on "the privilege of doing [an interstate] business" (430 U.S. at 278-279 (original quotation marks omitted)). In repudiating that doctrine, obviously, the Court cast no doubt on the continuing validity (at least as to result) of decisions that had *sustained* state taxes under the old rubric.

In any event, there is no merit to appellants' suggestion (84-921 J.S. 35-36; 84-929 J.S. 10-18) that Florida's tax fails *Complete Auto*'s "fair apportionment" or "fair relation" tests. See 430 U.S. at 279. Because the taxable event—sale of the fuel—takes place wholly within Florida, no other state could undertake to impose a tax on that transaction, and apportionment is thus not constitutionally required. Appellants' contention that Florida's tax is not "fairly related to the services

provided by the State" (*Complete Auto,* 430 U.S. at 279) is based on assertions that the tax is really a user fee, that the proceeds of the tax are devoted to road construction, and that airlines do not derive from Florida's roads a benefit proportional to the tax they pay. See 84-921 J.S. 37-39; 84-929 J.S. 11-17. As the courts below pointed out, however, each of these assertions is erroneous. See 84-921 J.S. App. 11a-12a; 84-929 J.S. App. 7a, 11a, 29a, 34a. The tax is plainly a sales tax because its legal incidence is upon the fuel seller and is imposed for the privilege of selling fuel in Florida. The proceeds of the tax are not devoted to "the construction and maintenance of state roads," as was once true (Fla. Stat. Ann. § 206.46 (West 1971)), but go into a trust fund to "be used for transportation purposes" (Fla. Stat. Ann. § 206.46 (West Supp. 1985)). And appellants do enjoy, not only the benefits of Florida's public transportation network, but also "the benefits of a trained work force and the advantages of a civilized society" (*Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445 (1979)).[2]

2. Appellants' equal protection challenge is also insubstantial. They contend that Florida's fuel tax regime

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[2] Although appellants appear to engage in foreign as well as interstate commerce (see 84-926 J.S. 4; 84-929 J.S. 8), they did not contend in either court below that Florida's tax as applied to them violates the Foreign Commerce Clause. See, *e.g.*, 84-921 J.S. App. 2a. In a brief filed at the Court's invitation contemporaneously with this one, we express the view that Florida's tax, as applied to aviation fuel purchased by foreign airlines for use exclusively in foreign commerce, is unconstitutional under the Foreign Commerce Clause as interpreted in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 451 (1979). See 84-902, 84-922 & 84-1041 Br. 30-35. The Court in *Japan Line* specifically declined to reach "questions as to the taxability * * * of domestically owned instrumentalities engaged in foreign commerce" (441 U.S. at 444 n.7). Since appellants did not raise this question below and consequently do not present it for review here, we have no occasion to address it.

places a heavier burden on airlines than on railroads and maritime shipping companies, since the latter (a) have their sales tax reduced by application of a mileage proration formula, a benefit airlines no longer enjoy, and (b) pay tax based on the actual price of their fuel, rather than (as is true for airlines) on an "initially established price" of $1.148 per gallon (84-921 J.S. 29-34; 84-926 J.S. 5-6; 84-929 J.S. 18-22). And appellants contend that Florida's fuel tax regime places a heavier burden on airlines than on trucking companies, even though both pay sales tax at 5% of an "initially established price" of $1.148 per gallon without mileage proration, since the market price of jet fuel during the relevant period was lower than that of diesel fuel and gasoline (84-921 J.S. 32-33; 84-929 J.S. 7 & n.4, 17). In appellants' view, the Equal Protection Clause requires that all carriers be treated identically.

It was long ago established that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." An equal protection challenge can prevail "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* Accord, *e.g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-365 (1973) (citing cases).

The courts below correctly concluded that appellants "failed to demonstrate that a hostile and oppressive discrimination has been made" (84-926 J.S. App. 5). Florida's fuel tax regime, as revised effective April 1, 1983, does appear to impose a heavier burden on airlines than on other carriers, although the differential burden depends in part on the relative market prices of

various fuels, whose fluctuations are of course beyond the Florida Legislature's control. Florida's overall tax system, however, treats airlines more favorably in other respects. See 84-921 J.S. App. 13a-14a; 84-929 J.S. App. 31a. The State, moreover, cannot be said to have lacked a rational basis for repealing the mileage proration formula in the case of interstate air carriers, since "proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage" (84-929 J.S. App. 31a). Although state taxes are not altogether immune from equal protection scrutiny (see *Metropolitan Life Ins. Co.* v. *Ward*, No. 83-1274 (Mar. 26, 1985)), the tax regime challenged here, relieved of the income-tax-credit provision struck down by the Florida Supreme Court, neither discriminates against out-of-state competitors nor lacks a rational relationship to Florida's legitimate purpose of raising money for public transportation.

3. Appellant in No. 84-926 challenges the holding that it lacks standing to contest the constitutionality of provisions governing fuel tax refunds to certain fishermen and farmers (J.S. iv, 4-5). Appellant did not allege that it competed, directly or indirectly, with farmers or fishermen (84-926 J.S. App. 11), and the Florida Supreme Court accordingly denied it standing to raise this challenge, reasoning that "the constitutionality of * * * a statute cannot be tested by a party whose rights or duties are not affected by it" (*id.* at 11-12). In so ruling, the court relied exclusively on Florida law. See *id.* at 11-13. In any event, its ruling is fully consistent with this Court's decisions. See *Allen* v. *Wright*, No. 81-757 (July 3, 1984).

CONCLUSION

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

JIM J. MARQUEZ
General Counsel
Department of Transportation

SEPTEMBER 1985